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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNS-MANVILLE CORPORATION AND
JOHNS-MANVILLE SALES CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF EAGLE-PICHER INDUSTRIES, INC., AND UNR INDUSTRIES, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITION

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Eagle-Picher Industries, Inc. ("Eagle-Picher"), and UNR Industries, Inc. ("UNR"), like petitioner Johns-Manville, are private manufacturers who during World War II responded to the government's insistence on, and need for, asbestos-containing insulation products for installation aboard United States naval and merchant vessels.

Like Johns-Manville, Eagle Picher and UNR have filed claims against the United States in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491. *See Eagle-Picher Industries, Inc. v. United States*, Claims Court No. 170-83C, filed March 25, 1983; *UNR Industries, Inc. v. United States*, Claims Court No. 16-84C, filed January 16, 1984. The government has recently moved to dismiss those claims pursuant to 28 U.S.C. § 1500, based on the holding of the Federal Circuit for which Johns-Manville seeks certiorari here.

Eagle-Picher and UNR file this brief as *amici curiae*, pursuant to Rule 36 of the Rules of the Court, and with the consent of all parties, in support of Johns-Manville's petition for certiorari.

INTEREST OF AMICI

Eagle-Picher and UNR are similarly situated to petitioner Johns-Manville with respect to the jurisdictional basis for their claims against the United States pending in the United States Claims Court. The United States is relying on the Federal Circuit's decision in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), to argue that 28 U.S.C. § 1500 bars Claims Court jurisdiction over Eagle-Picher's and UNR's Tucker Act claims as well. The United States bases its argument on the same nebulous "operative facts" standard proclaimed by the Federal Circuit in *Johns-Manville*.

ARGUMENT

THE COURT SHOULD GRANT JOHNS-MANVILLE'S PETITION FOR CERTIORARI BECAUSE:

(1) If Left Unreviewed, the Federal Circuit's Vague and Overly Broad Interpretation of Section 1500 Will Serve as a Congressionally Unintended Roadblock to Parties With Meritorious Claims Against the United States.

28 U.S.C. § 1500 provides, in relevant part, that the "United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . ." In *Johns-Manville*, a divided panel of the Federal Circuit held that Johns-Manville's prior-filed *tort* claim against the government for contribution for injuries suffered by one plaintiff in one shipyard was the same "claim"—for Section 1500 purposes—as Johns-Manville's later-filed Tucker Act claim for *contract* damages arising from breach of terms of its procurement contracts with the government.

Merely because the Tucker Act claim shared some common elements with the tort claim, and apparently because both related generally to the government's role in causing the ever-mounting asbestos liability tragedy, the Federal Circuit held that the Tucker Act claim was the "same" claim "for or in respect to which" Johns-Manville had already sought recovery. The court dismissed the very significant differences between the prior-filed district court tort claim and the Claims Court Tucker Act claim as merely relating to alternate theories of liability, and focused selectively on some factual assertions that happened to overlap between the two Complaints. Pet. App. at 15a.

The Federal Circuit based its approach to the question of whether or not the claims were indeed the "same" claim for Section 1500 purposes on what it called an

"operative facts" analysis. Pursuant to that analysis, the court ignored the following differences:

(1) the claims sought recovery for injuries to and damages paid to *different underlying claimants*;

(2) the claims sought recovery for injuries and procurement contracts in *different shipyards*;

(3) the claims sought recovery for injuries and procurement contracts involving *different time periods*; and

(4) the claims depended on different legal and factual elements for their success or failure.

Amici respectfully submit that any rule of law that would allow such widely disparate claims to be considered the "same claim" is seriously flawed, and will have a severe limiting effect on the Claims Court's jurisdiction never contemplated by Congress when it enacted Section 1500's predecessor statute in 1868.[1]

The Federal Circuit's ruling creates uncertainty among claimants against the government who hereafter would be required to elect, at their peril, to pursue only one of two (or more) potentially meritorious claims. Under the Federal Circuit's holding, so long as the claims relate to the same general subject and series of events—no matter how widely separated in time, location, facts, and circumstances—the claims will be the "same" for Section 1500 purposes. Claimants would be foreclosed from asserting *any* Tucker Act claims arising in the 1980's if they happened to file tort claims for contribution arising from injuries suffered in the 1940's, so long as both sets of

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[1] As this Court has held, the predecessor statute to Section 1500 was enacted "only to require an election between a suit in the Court of Claims and one brought in another court in which the judgment would not be res adjudicata." *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932).

claims arose from the same arguably related historical series of events. Similarly, claimants who are in the putatively advantageous position of having meritorious claims based *both* in tort and contract will find themselves in fact *dis*advantaged by having to choose—at their peril—to assert one and to abandon the other.

Because of the limited applicability of the Section 1500 jurisdictional bar to the Claims Court and its reviewing court, the Court of Appeals for the Federal Circuit, the Court could not expect to find a conflict among the Circuits to support the grant of certiorari. However, the *intra*-Circuit equivalent of such conflict does exist. The Claims Court itself has observed that "Section 1500 is an anachronism," and that "[i]ts repeal has been urged because it has outlived its original purpose, its applicability is not understood, and may result in wasteful litigation." *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984). Indeed, the Claims Court has further observed that "Section 1500 serves no useful purpose in today's legal environment. . . ." *Arizona Helicopters, Inc. v. United States*, 4 Cl. Ct. 662, 665 (1984). There, the court further noted that "the United States Court of Claims, our predecessor court, cautioned against a literal reading of [Section 1500] by teaching that this section should *not be given a doctrinaire or purely technical interpretation but should be given a reasonable and just construction.*" *Id.* at 665 (emphasis added). *Accord, Brown v. United States*, 358 F.2d 1002, 1005 (Ct. Cl. 1966).

In light of this ample precedent requiring confinement of Section 1500 to its bare terms, the Federal Circuit's decision to read the statute *more* expansively than any court has ever done before appears all the more surprising and troublesome in its implications, and clearly warrants review.

(2) If Left Unreviewed, the Federal Circuit's Decision May Foreclose Any Further Judicial Consideration of the Government's Role in and Responsibility for the Asbestos Liability Tragedy.

More than 63,000 asbestos-related personal injury lawsuits are currently pending in the state and federal courts of this nation.[2] New asbestos-related personal injury lawsuits are being filed at the rate of over 1,300 per month.[3] Claimants in over fifty percent of these actions have alleged that they were exposed to excessive amounts of asbestos in the course of their employment at government-owned or government-controlled shipyards engaged in the manufacture and repair of United States naval and merchant vessels pursuant to government contracts.

Although former manufacturers of asbestos-containing insulation products responded to their government's call in World War II to support the most massive shipbuilding effort in history,[4] to date the government has not responded to the call of either the manufacturers or of the shipyard workers. The government has steadfastly remained aloof and consistently declined to participate in dealing with the unfortunate legacy of illness and liability left in the wake of that effort.

Section 1500 is merely the latest in a long series of technical legal and procedural impediments that have prevented manufacturers from achieving full judicial review on the merits of their claims that any liability for the adverse health effects of uncontrolled World War II as-

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[2] M. Peterson & M. Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* 5 n.10 (Rand Corporation, Institute for Civil Justice No. N-2805-ICJ 1988).

[3] *Id.*

[4] F. Lane, *Ships for Victory* 3, 60-66 (1951); H. Rogers & J. Friedman, *Shipbuilding and the Defense Program* 1-2 (Office of Production Management, Bureau of Research and Statistics 1941).

bestos exposure must be shared by the one entity that: (i) expressly required *by contract* the inclusion of asbestos in insulation materials procured for use on Navy ships; (ii) had sole control of the conditions of its use and installation; and (iii) had sole responsibility for industrial hygiene and worker safety in its own shipyards. That entity, of course, is the United States.

Leaving the Federal Circuit's decision unreviewed would result in denying what may be the last judicial forum available to claimants such as Eagle-Picher and UNR. Complex social, economic, and legal problems of the dimension of the asbestos liability crisis should not be barred from full judicial review on the merits by strained interpretations of statutes like Section 1500. The Federal Circuit's newly-expanded and patently questionable interpretation of an unquestionably anachronistic procedural restriction merits this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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